

ORIGINAL

BEFORE THE  
Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	GC Docket No. 95-52
	)	
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COMMENTS OF AMERICAN WOMEN IN RADIO AND TELEVISION, INC.

American Women in Radio and Television, Inc. ("AWRT") hereby submits its Comments on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

1. The NPRM invites comments on the continued efficacy of the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) (the "Comparative Policy Statement") which for many years has governed the conduct of comparative broadcast hearings. Until the case of Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992), there was no serious challenge to the application of the various comparative criteria, and the FCC had vigorously defended the Comparative Policy Statement in numerous court proceedings. The NPRM appears to be an overreaction to the Bechtel case insofar as it proposes an overhaul of the existing system. AWRT believes that some modification may be necessary but the Commission's action should be focused and the Commission should carefully explain its rationale.

2. While AWRT supports appropriate modification of the Comparative Policy Statement, it opposes any attempt to substitute a lottery-type proceeding for the present comparative process. AWRT is concerned that the "point system" proposed in the NPRM may create a lottery-type scheme.

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3. AWRT is also very concerned over the status of the Commission's female preference policy which is not being applied in comparative cases in the aftermath of Judge Clarence Thomas' decision in Lamprecht v. FCC, No. 88-1395, (D.C. Cir. February 19, 1992). AWRT submits that Judge Thomas' decision was not predicated on accurate facts and failed to consider other readily available statistics which fully demonstrate the dearth of female ownership of radio and broadcast stations. Accordingly, AWRT urges the Commission to reexamine the existing statistics on female ownership of broadcast facilities and reinstate the female preference policy.<sup>1</sup>

I. The FCC's Reexamination of  
Certain Comparative Criteria

4. In the NPRM, the Commission has announced its intention to consider whether to retain, eliminate, or modify four criteria.<sup>2</sup> These are (a) the integration criterion; (b) proposed program service; (c) past broadcast record and (d) auxiliary power. In addition, the NPRM raises the possibility of adding two new criteria -- a "service continuity preference" designed to encourage comparative applicants to retain the stations they are attempting to secure through the comparative hearing process for a three year period and a "finders preference" for applicants who successfully petition for a new allotment of a frequency.

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1/ AWRT feels keenly that women are not being afforded adequate opportunities to obtain ownership of broadcast facilities and it intends to separately file a petition for rulemaking requesting extension of the tax certificate and distress sale policies to women.

2/ The Commission has stated that it will not address the distinct issues raised in comparative renewal proceedings. Comparative renewal cases raise separate issues which should not be considered here.

5. At the outset, the proposed program service criterion is rarely used and would hardly be missed were the Commission to eliminate it. Furthermore, the Commission should refrain from basing comparative decisions on programming proposals because of First Amendment concerns and because such proposals can freely be changed.

6. Like proposed program service, the past broadcast record criterion is also rarely utilized. Applicants who seek addition of a past broadcast record issue must first make a threshold showing that the past broadcast record is unusually good or unusually poor. If a showing of unusually poor past broadcast record is made, it would certainly appear to demand Commission consideration. Similarly, a showing of unusually good past broadcast record is deserving of credit.

7. While auxiliary power may not be the most important of the comparative criteria, it does not give rise to extensive litigation. Retention of the criterion seems appropriate in view of the fact that major power blackouts do occur. For instance, on May 26, 1992, most of Dade County, Florida experienced a power blackout for a short period of time during the day.

8. The most significant criterion that the Commission seeks to examine is the integration criterion. As the NPRM observes, the Comparative Policy Statement presumed that an owner integrated into the day-to-day management of the station would inherently provide better service than a non-integrated owner by linking legal responsibility and day-to-day performance and by being more sensitive to local community needs. 1 FCC 2d at 395. According to the Commission, current circumstances warrant inquiry as to the validity of the integration criterion in

practice. The NPRM also seeks comment on whether credit should be granted for the use of professional management and, if so, what weight should be given to it.

9. The integration criterion sprung out of the Commission's belief in "localism" and the importance of serving one's community. It was considered that an owner who participated in the management of his or her station on a day-to-day basis would be more responsive to community concerns. Experience has shown that a local day-to-day owner manager is also less likely to permit unauthorized control of his/her facility or inadequately supervise the station.

10. AWRT does not believe that elimination of the integration criterion is either wise or appropriate. Advocating elimination of the criterion is akin to arguing that the FCC Commissioners need not be based in Washington for their day-to-day management activities or that the President or congressmen need not conduct their jobs in Washington. If the FCC Commissioners can't be absentee Commissioners, why should absentee ownership of broadcast facilities be rewarded?

11. AWRT does not believe that credit for the use of professional management will substantively enhance the comparative process in any way. The use of professional management alone suggests no corresponding benefit to the community unless a specific proposal responding to community needs is presented. The proposal would lead to extensive litigation as to just what kind of "professional management" should be afforded credit.

12. While noting that the diversification factor reflects the Commission's traditional goal of seeking to promote diversity of viewpoints, the Commission questions whether it is appropriate

to alter the way it comparatively considers diversification. The promotion of diversity of viewpoints is such a fundamental Commission policy that AWRT submits it should not be fundamentally changed.

13. With regard to substantive criteria, the NPRM also proposes to add two new comparative factors: (a) a "service continuity preference" and (b) a "finder's preference." AWRT does not believe that either preference is necessary and submits that these preferences could be used to subvert the comparative process. Under the "service continuity preference, the Commission proposes to award credit to applicants committing themselves to own and operate the station for at least three years.<sup>3</sup> It is likely that all applicants will seek this preference. The Commission could easily change its rules without establishing a specific preference. Moreover, the Commission should make clear whether any justifications apart from a minority distress sale would warrant a waiver of a three year rule. For instance, would illness or bankruptcy justify a waiver? The proposed "finder's preference" could readily be abused. At the present time, those who seek the allotment of a new channel can apply as "XYZ Corporation" and are not required to further identify themselves. Allotments can be sought by engineering consultants who subsequently find an applicant once the frequency is allotted. It will be next to impossible in many instances for the Commission to determine whether the eventual applicant is indeed the party that sought the allotment.

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<sup>3/</sup> Under the present rules, those who acquire their station pursuant to Commission decisions in comparative proceedings must own and operate the station for one year after program test authority. See 47 C.F.R. §73.3597(a)(1).

## II. The Commission Should Promptly Move to Reinstate The Female Preference

14. In the NPRM, the Commission proposes to consider how minority and female ownership should be treated and whether they should be credited if integration is eliminated as a comparative factor. However, the NPRM states that the discussion of the gender preference may require modification depending on the ultimate outcome of the Lamprecht case. In practice, the Commission has already ceased to award female preferences, despite the fact that it appears to be in clear violation of the FCC appropriations legislation.

15. The Commission has substantial factual evidence which justifies reinstatement of the female preference. First, it is evident that Judge Thomas did not carefully review the Congressional Service Study, dated June 29, 1988. That study concluded:

...based on these findings, there is a strong indication that minority and women station ownership results in a greater degree of minority programming. Therefore, an argument can be made that FCC policies that enhanced minority and women station ownership may have resulted in more minority and other audience targeted programming.

(Emphasis added).

Moreover, apart from the programming aspect, the CRS study revealed an abysmal lack of significant broadcast ownership by women. Figure 4 of the study reflects that of 8,720 radio stations, women had controlling interests in only 7.1%.

16. The study on Female Ownership of Broadcast Stations conducted by the ERLA Group, Inc. and commissioned by the Commission which was released on August 6, 1982 confirms the paucity of female ownership. That study revealed that women were majority owners of only 8.6% of AM stations, 9% of FM stations and 2.8% of

television stations. Thus from the ERLA study to the CRS study (or from the early 1980s to the late 1980s), women did not achieve significant gains in broadcast ownership. AWRT submits that the situation has not improved and swift action is needed to improve female ownership of broadcast facilities.

17. AWRT is concerned at the Commission's suggestion that the minority (or female) preference can survive independent of the integration criterion. The courts have never sanctioned a preference per se. Indeed, in TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), the Court of Appeals specifically grounded the award of a merit for minority ownership on stock ownership by Blacks in a television applicant and their proposed participation in station affairs. The Supplemental Opinion of Judge Fahy in response to the Commission's petition for reconsideration en banc observes that "The Commission mistakenly refers to the court's holding as directing the Commission to adopt a "new comparative policy of awarding preferences for Black or minority ownership, per se." (Emphasis added). 495 F.2d at 941. In Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3024 (1990), the Supreme Court emphasized that "Congress and the Commission have adopted a policy of minority ownership not as an end in itself, but rather as a means of achieving greater programming diversity." A preference which is not linked to the integration criterion raises serious constitutional concerns.

**III. The "Point System" Which The Commission  
Proposes To Use In Comparative Systems  
Will Be Inflexible And Unworkable**

18. One benefit of the Commission's present comparative system is that it contains a great deal of flexibility in determining the strength of the preferences to be awarded. The

proposed "point system" that the NPRM is considering appears to be an inflexible mechanism which does not readily lend itself to comparative broadcast hearings. In fact, the proposal is strikingly reminiscent of the lottery mechanism which the Commission previously abandoned. For instance, assuming that the Commission's existing preferences for local residence and prior broadcast experience remain, there is no indication as to how applicants with differing amounts of local residence or broadcast experience will be treated.<sup>4</sup> Similarly, the point system would be difficult to use in evaluating the myriad of factors that are considered under the diversification criterion.

19. The point system also readily lends itself to the very kinds of abuses the Commission has been attempting to eliminate unless the Commission makes it clear that competing parties will have a full opportunity to engage in discovery and cross-examination with respect to the points claimed by a competitor. The NPRM fails to contain any details as to how the point system will work procedurally or who will make the ultimate determination as to the number of points to be awarded. The factual predicate for changing to a point system has simply not been established.

20. Assuming implementation of a point system, the NPRM proposes three possible tie-breakers. First, the NPRM suggests that in a tie situation, the Commission might grant the application of the applicant first filing for the facility in question. This would appear to reward pure luck and certainly does not

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<sup>4/</sup> There is simply no merit to the Commission's suggestion that broadcast comparative hearings are in any way like ITFS cases where a point system has been utilized. The applicants are different and the criteria are totally different.



constitute an appropriate basis for selecting one applicant over another. Second, the NPRM raises the possibility of using substantial broadcast experience as a tie-breaker but notes that such a tie-breaker may adversely impact women and minorities. The proposed use of broadcast experience as a tie-breaker is not consistent with the well established principle that the credit for broadcast experience should be relatively minor so as not to discourage newcomers such as women and minorities. The various reports and orders underlying the FCC's EEO rules provide ample evidence that women and minorities have not achieved equality in the broadcast industry. These groups will suffer unfairly if broadcast experience is used as a tie-breaker. The Commission's third proposal is to choose the winning applicant randomly in the event of a tie. This proposal is perhaps most indicative of the likely failure of a point system. There is less likely to be a need for a random selection under the existing comparative criteria, and the Commission has failed to demonstrate how a point system with a random selection at the end will constitute any improvement in the selection process. AWRT has no objection to a refinement of the present system with the use of random selection if no other criteria are dispositive. But the substitution of a point system with an automatic random selection in a tie-breaker situation certainly sounds like a lottery which should be avoided.

**IV. Any Changes In The Comparative Process Should  
Not Apply to Pending Applications**

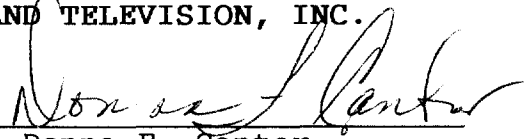
21. Many applicants have already spent a considerable amount of time prosecuting their applications under the current rules. It would be fundamentally unfair to force them to now face a totally revised set of criteria. Even recently-filed

applicants have filed and paid their fees on the basis of a given set of criteria. Therefore, AWRT submits that any changes should apply only prospectively on a given date to applicants who have not yet filed applications. Moreover, the Commission should keep in mind that any radical changes in the comparative process could well lead to court remands of cases already decided under the existing criteria. Therefore, it is important that the Commission carefully consider any changes and fully explain its actions.

Respectfully submitted,

AMERICAN WOMEN IN RADIO  
AND TELEVISION, INC.

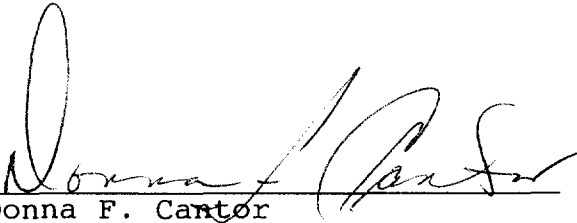
By

  
Donna F. Cantor  
Executive Director

CERTIFICATE OF SERVICE

I, Donna F. Cantor, do hereby certify that I have this 2nd day of June, 1992, mailed by first class United States mail, postage prepaid, copies of the foregoing "**COMMENTS OF AMERICAN WOMEN IN RADIO AND TELEVISION, INC.**" to the following:

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